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No. 87-621

Supreme Court, U.S.
FILED
OCT 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

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CALIFORNIA ARCHITECTURAL BUILDING PRODUCTS, INC.,
a California Corporation, et al.,
Petitioners and Cross-Respondents,

vs.

FRANCISCAN CERAMICS, INC., et al.,
Respondents and Cross-Petitioners.

(Consolidated)
86-5822
86-5834
86-5974

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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50 pp

QUESTION PRESENTED

1. Was the Ninth Circuit's rejection of the "single criminal episode" exception to RICO's pattern requirement in conflict with the decisions in other circuits?

DESIGNATION OF PARTIES AND CORPORATE RELATIONSHIPS

1. Cross-Respondent California Architectural Building Products, Inc. is a corporation organized and existing under the laws of the State of California. Cross-Respondent Facings of America, Inc. is a corporation organized and existing under the laws of the State of Arizona. Cross-Respondent Richard T. Sokol is the owner and proprietor of Valley Tile Distributors. Cross-Respondent Southwestern Ceramics & Supply Company is a corporation organized and existing under the laws of the State of California. Cross-Respondent Paragon Industries, Inc., doing business as Bedrosian Building Supply, is a corporation organized and existing under the laws of the State of California. The following are individual cross-respondents: Charles T. Nelson and T. James Nelligan (California Architectural); Henry C. Croom (Facings); Richard Sokol (Valley Tile); Larry Bedrosian (Bedrosian Building); and Vincent M. Pompo (Southwestern Ceramics). The cross-respondents will hereinafter be referred to as "Tile Dealers".

2. Cross-Petitioner Franciscan Ceramics, Inc. is a California corporation, having its principal place of business in Glendale, California, in the Central District of California. Franciscan Ceramics, Inc. is a wholly-owned subsidiary of Cross-Petitioner Josiah Wedgwood & Sons, Inc.

3. Cross-Petitioner Josiah Wedgwood & Sons, Inc. is a corporation organized and existing under the laws of Delaware, with its principal place of business in New

Jersey, and is authorized to do and does business in the Central District of California. Josiah Wedgwood & Sons, Inc. is a wholly-owned subsidiary of Cross-Petitioner Wedgwood plc.

4. Cross-Petitioner Wedgwood plc is a corporation organized and existing under the laws of the United Kingdom. On or about November 1, 1986, Wedgwood plc was acquired by Waterford Glass Group plc of Dublin, Ireland.

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No. 87-621

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OCTOBER TERM, 1987

CALIFORNIA ARCHITECTURAL BUILDING PRODUCTS, INC., a California Corporation, et al.,
Petitioners and Cross-Respondents,

VS.

FRANCISCAN CERAMICS, INC., et al.,
Respondents and Cross-Petitioners.

(Consolidated)
86-5822
86-5834
86-5974

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cross-Petitioners respectfully request that this Cross-Petition for Writ of Certiorari be granted.

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California was not officially reported. A copy of the District Court's Order and Judgment are attached as Appendix A.

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on June 4, 1987, and can be found at 818 F.2d 1466. The opinion was amended, and cross-respondents' motions for rehearing and hearing *en banc* were denied on July 31, 1987. A copy of the opinion as amended is attached as Appendix B.

JURISDICTION

1. This case arises under the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. Original federal jurisdiction is invoked pursuant to 18 U.S.C. § 1964 and the Federal Question Statute, 28 U.S.C. § 1331.

2. Summary judgment was granted in the United States District Court for the Central District of California (Whelan, J.) on March 5, 1986, and was affirmed by the Ninth Circuit Court of Appeals on June 4, 1987, and as amended on July 31, 1987.

3. The order denying cross-respondents' motion for rehearing and hearing *en banc* was issued on July 31, 1987.

4. The Supreme Court has jurisdiction to review the summary judgment in this case by writ of certiorari pursuant to 28 U.S.C. § 1254.

5. This cross-petition for writ of certiorari is filed by Petitioners Franciscan Ceramics, Inc., Josiah Wedgwood & Sons and Wedgwood plc pursuant to Supreme Court Rule 19.5. The cross-respondents' petition for writ of certiorari was received by cross-petitioners on September 29, 1987.

CITATION OF CONSTITUTIONAL PROVISIONS AND STATUTES:

1. 18 U.S.C. §§ 1961, 1962 and 1964.

The text of this statute is set forth in Appendix C.

STATEMENT OF THE CASE

(a) History of the Litigation

This case concerns the conduct of respondents and cross-petitioners Franciscan Ceramics, Inc., and parent companies Josiah Wedgwood & Sons, Inc., and Wedgwood plc (hereinafter collectively referred to as "Franciscan") in closing Franciscan's failing ceramic tile production plant in September of 1983. The closure of the Franciscan factory spawned a series of breach of contract, fraud and related actions in California state court between Franciscan and a few non-exclusive tile dealers who had purchased Franciscan ceramic tile for resale to the public and construction trade. These commercial disputes centered on Franciscan's inability to deliver ordered or advertised tile due to the closure of its only factory, located in Glendale, California and the tile dealers' failure to pay for tile which had been ordered and received prior to closure.

Subsequent to the filing of the state court actions, the tile dealers brought an action in federal court on September 20, 1984, alleging a one count violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO"). The RICO complaint, which was first amended on October 29, 1984, charged Franciscan with a sinister and secret scheme devised on or before May 6, 1983, to close Franciscan's Glendale plant in September or October of 1983. (E.R. 3, 6-8). The alleged RICO plot contained three main elements according to

the First Amended Complaint: (1) "determining to form a plan for closure" on or about March 31, 1983; (2) a decision "[s]ometime prior to May 6, 1983 . . . to close the Franciscan Tile Plant in September or October of 1983," and, pursuant to this decision, (3) Franciscan's misrepresentations to the tile dealers "that [it] would continue in production, for the purpose of selling off Franciscan's inventory" which would "suffer a significant diminution in value" upon closure and thereby "wrongfully shift this diminution in value" to the tile dealers. (E.R. 6-9).

The First Amended Complaint repeatedly charged that Franciscan had lied to the tile dealers in order to unload inventory by promising or advertising future delivery of tile after October 1983 when it "knew it would not" make such delivery and "had no intention" of making delivery (E.R. 7, 12-26).

On December 16, 1985, the tile dealers moved for leave to amend the First Amended Complaint. The proposed Second Amended Complaint alleged "alternatively" that Franciscan had schemed to unload inventory by misrepresenting to the tile dealers it "had a plan to stay in business producing tile until at least March of 1984," when in fact it was "actively considering" closure and "knew it would not" continue in production until March 1984. (E.R. 119-122).

On December 23, 1985, Franciscan filed a motion for summary judgment based upon all the evidence elicited during discovery, including thousands of business records and dozens of depositions of Franciscan officers, directors and employees, as well as the tile dealers. Franciscan stated as its basis for the motion for summary judgment, two positions. One, there was no genuine issue as to Franciscan's intent to defraud the tile dealers — Franciscan operated its business as a going concern and

had no secret plan to wind down and dump inventory. Two, the evidence did not support a finding that Franciscan had engaged in a "pattern of racketeering activity" because there was only one allegedly deceptive event, that of Franciscan's purported scheme to unload inventory prior to closure.

On March 4, 1986, the district court granted summary judgment and denied leave to amend on the apparent ground that the evidence could not establish a "pattern of racketeering activity" under RICO. (E.R. 2422). An appeal to the Ninth Circuit was timely filed on April 2, 1986 and was argued on February 3, 1987. The Ninth Circuit, on June 4, 1987, affirmed the lower court's grant of summary judgment and denial of leave to amend after reviewing the record below *de novo*. The circuit court affirmed on the alternative ground that the tile dealers failed to show that there was a genuine issue of fact regarding the allegations of RICO fraud. It rejected the lower court's ruling that the tile dealers had not shown a "pattern of racketeering activity" under RICO.

(b) Uncontroverted Facts Concerning Franciscan's Closure

In 1979, Wedgwood purchased, through its wholly-owned U.S. subsidiary Josiah Wedgwood, all of Franciscan's U.S. operations, chiefly located in Glendale, California. From the date of acquisition until it was closed in October 1983, Franciscan operated at a net loss. As Franciscan's 1982-83 business year neared its end in March 1983, executives at the company faced the prospect of reporting total losses in the ceramic tile division of over $1 million, 35% worse than budgeted projections. (E.R. 378).

As a result, Wedgwood and Franciscan executives, in March of 1983, revised their projections for the coming

year and appointed a team to review Franciscan's operations. By the end of April the team was prepared to and did recommend a course of action, which included appointment of a new management group and rigid adherence to a 1983-84 business year plan designed to increase sales and reduce costs, develop and promote new lines of tile and new colors for existing lines, obtain outside consulting help to evaluate and hopefully eliminate production and equipment problems, participate in an expensive and time-consuming mass advertising program and, finally, reduce prices on popular tile brands. Franciscan continued its production of tile at full capacity between April and September, 1983. (E.R. 198-209, 228-44, 278-288, 279-99, 302, 305-348, 379-407, 459-60, 510, 512, 514-15, 571-72, 559, 548, 560).

Despite Franciscan's consistent adherence to every aspect of the business plan described above, production expenses increased, tile inventory at Franciscan's warehouse grew at an alarming rate and Franciscan suffered over a half million dollars in net operating losses in the first half of the 1983-84 business year. (E.R. 4635, 472-73). In September of 1983, when Wedgwood's senior operating executive, Peter Williams, came to California for his annual review of operations, he decided to recommend closure of Franciscan's tile operation to Wedgwood's directors. (E.R. 306). Williams did so and, on September 22, 1983, a decision was made to close Franciscan.

During the April to September, 1983 period, Franciscan routinely sent out to all tile purchasers, including the tile dealers, letters describing its volume discount pricing plan, agreements to supply certain quantities of tile in the future at specified prices, and other routine business correspondence. (E.R. 62, 103, 540).

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

I.

The Ninth Circuit's Rejection Of The "Single Criminal Episode" Exception To Rico's Pattern Requirement Is In Conflict With The Decisions In Other Circuits.

To be liable under 18 U.S.C. § 1962(c), a defendant must have participated in the affairs of an enterprise through a "pattern of racketeering activity." In *Sedima S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985), this Court invited the lower courts as well as Congress "to develop a meaningful concept of 'pattern' " under RICO to avoid "[t]he 'extraordinary' uses to which civil RICO has been put." 105 S. Ct. at 3287. *Sedima* warned that two or more acts of racketeering may not form a "pattern" unless the acts are of sufficient continuity and relatedness to establish a threat of continuing activity. The following statement of purpose from the legislative history was found by this Court to be instructive:

> 'The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" *and* the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.'

Id. at 3285 n. 14 (Quoting S. Rep. No. 91-617, p. 158 (1969)). (emphasis added).

Since the invitation in *Sedima* to fashion a workable standard for establishing a pattern, a number of courts have experimented with various analytical tests. Starting from the position that the flaw in the pre-*Sedima* ap-

proach to analyzing a pattern was the "mistaken assumption that any two acts automatically spell out a pattern," several courts focused on the limitations inherent in the notion of "continuity." *Northern Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828, 832 (N.D. Ill. 1985). The originator, and leading proponent of the "single criminal episode" exception to RICO's pattern requirement was Judge Milton I. Shadur, who wrote the *Inryco* opinion.

In *Inryco*, Judge Shadur rejected pre-*Sedima* precedent, finding that "[w]ith such an unmistakable signal from the Supreme Court, this Court is no longer obligated to follow contrary Court of Appeals opinions." *Id.* at 833. Judge Shadur went on to hold that multiple kickback payments in furtherance of a single criminal end to defraud a party to a contract, does not establish the necessary pattern of racketeering. *Id.* The court explained that while the predicate acts may have been sufficiently related to one another to suggest a common scheme, they did not establish *continuity*:

> Surely the continuity inherent in the term ["pattern"] presumes repeated criminal *activity*, not merely repeated *acts* to carry out the *same* criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'

Id. at 831. (emphasis in original).

Since the *Inryco* opinion was published, the single criminal episode exception to RICO's pattern requirement has been staked out as the major battlefield upon which legitimate businesses and enterprises have fought against RICO's severe penalties. It is not surprising,

therefore, that it has been directly passed upon by almost all the federal circuit courts.[1]

The Second, Ninth and Eleventh Circuits have flatly rejected the concept of the isolated scheme inherent in the "single criminal episode" test. The Ninth Circuit in the present case summed up the position of these circuits best by holding that the "plain words of RICO preclude it. RICO defines 'pattern of racketeering activity' without mentioning continuity. *See* 18 U.S.C. § 1961(5). There is no suggestion that the underlying illegal acts must be part of different criminal episodes." *California Architectural Bldg. Prods. Inc. v. Franciscan*, 818 F.2d 1466, 1469 (9th Cir. 1987).[2]

---

[1]*See Roeder v. Alpha Indus., Inc.*, 814 F.2d 22 (1st Cir. 1987); *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987); *International Data Bank Ltd. v. Zepkin*, 818 F.2d 149 (4th Cir. 1987); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith*, 785 F.2d 1274 (5th Cir. 1986); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985); *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986); *Madden v. Gluck*, 815 F.2d 1163 (8th Cir. 1987), *cert. denied*, ____ U.S. ____ (Oct. 5, 1987); *California Architectural Bldg. Prods. Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987); *Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986).

[2]Although the Fifth Circuit held in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985) that any two related acts of mail fraud could constitute a pattern, thus seemingly rejecting the "single criminal episode" test, recent decisions by other panels reflect misgivings with this holding. See *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d 1274 (5th Cir. 1986); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423 (5th Cir. 1987). The *Montesano* panel urged overturning *R.A.G.S.* to ensure that schemes describing acts preparatory to one discrete accomplishment not constitute a pattern of racketeering activity. *Id.* at 426.

Several circuits, while rejecting the "single criminal episode" test, have nevertheless achieved the same result by dismissing cases where the predicate acts used to support a pattern relate to only a "single act." *Roeder v. Alpha Industries, Inc., et al.,* 814 F.2d 22, 31 (1st Cir. 1987); *International Data Bank Ltd. v. Zepkin,* 812 F.2d 149, 155 (4th Cir. 1987); *Morgan v. Bank of Waukegan,* 804 F.2d 790, 796 (7th Cir. 1986); *Condict v. Condict,* 815 F.2d 579 (10th Cir. 1987). Thus, the First, Fourth, Seventh and Tenth Circuits, while declining to adopt a "hard and fast set rule," *Morgan,* 804 F.2d at 977, nonetheless have adopted a factually-oriented, flexible rule for judging when, as the saying goes, once is not enough.

Only the Eighth Circuit, in *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986) and *Madden v. Gluck,* 815 F.2d 1163 (8th Cir. 1987), has required more than one fraudulent scheme to meet the pattern test. Adopting the "hard and fast set rule" rejected by the other circuits, the Eighth Circuit focused on the continuity aspect of a pattern, requiring that the wrongful conduct give rise to a real threat of continuing, criminal activity.

Those courts accepting Judge Shadur's reasoning, whether by a hard and fast rule or by some flexible, more factually-oriented test, have clearly done so in an effort to remain syntactically, yet intellectually honest with the spirit of RICO — the punishment of insidious criminal conduct which threatens the very fabric of society. The conundrum presented by RICO's public-spirited origins, but practical abuses, necessitates a clearer direction from this Court to the circuits on how to cope with the reality that even simple business transactions can generate numerous predicate acts. Absent such clear direction, no legitimate business can be safe from ruination by RICO's

devastating litigation expense, public embarrassment and frightening civil penalties.

Regardless of the language chosen by the circuits in wrestling with the pattern requirement, clearly all are trying to come to grips with conduct that is so singular, so brief and so isolated in time, place and manner, that to call it racketeering would undermine Congress' intent. *Zepkin,* 812 F.2d at 155. Like the difficult choices presented to this Court in the area of obscenity, RICO has forced the lower courts to rely upon an "I know it when I see it" standard. It is, therefore, no surprise that the Seventh Circuit adopted such a test, albeit with reservations that it would "necessarily be a bit rough around the edges at first." *Morgan*, 804 F.2d at 977. The result, of course, is uneven treatment of RICO defendants in the circuits, a condition which should not be permitted to continue.

Both the First and proposed Second Amended Complaints charged Franciscan with a scheme to close its factory at maximum profit by unloading its inventory onto the tile dealers prior to announcement of closure. This scheme was allegedly implemented by Franciscan through routine mailings and telephone calls to the tile dealers, over a period of approximately five months, regarding future sales of Franciscan tile. These mailings and telephone calls were simply everyday confirmations of price quotes, orders and price guarantees which had been made by Franciscan for many years in the same form and with the same effect. They were not produced pursuant to any special or separate motivation to defraud.

There are no allegations that the cross-petitioners fraudulently closed more than one manufacturing plant. Moreover, none of the tile dealers were the separate

targets of the alleged scheme and all were similarly situated *vis-a-vis* their relationship with Franciscan.

It is quite apparent that the alleged RICO scheme was an isolated event which did not pose a threat of continuing activity. The predicate acts — the mailings and telephone calls regarding future sales of tile — created only *one* allegedly deceptive event, that of Franciscan's purported intent to unload inventory prior to closure. Moreover, the predicate offenses were *not* independently motivated crimes, but rather purely ministerial acts which were part of Franciscan's routine sales operations. Cross-petitioners submit that they are entitled to exoneration from the charge of RICO by a finding that their conduct did not amount to a pattern of racketeering activity.

CONCLUSION

For the reasons stated above, cross-petitioners respectfully request the Court to grant this Cross-Petition for Writ of Certiorari. In the event cross-respondents' Petition for Writ of Certiorari is denied by this Court, however, cross-petitioners respectfully request dismissal of this Cross-Petition.

Respectfully submitted,

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October 29, 1987

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA ARCHITECTURAL BUILDING PRODUCTS, INC.,
Plaintiffs,
VS.
FRANCISCAN CERAMICS, INC., etc. et al.,
Defendants.

NO. CV 84 7125 FW

ORDER

The motions of defendants Franciscan Ceramics, Josiah Wedgwood & Sons and Wedgwood plc (1) for Summary Judgment on the First Amended Complaint and (2) for sanctions against plaintiffs and their counsel under Rule 11 of the Federal Rules of Civil Procedure, and plaintiffs' Motion for Leave to Amend the First Amended Complaint, came on regularly for hearing on March 4, 1986, at 1:30 p.m. in Courtroom 7 of the above entitled Court, and the Honorable Francis C. Whelan, presiding.

John W. Cotton of Rogers & Wells and C. Robert Ferguson appeared on behalf of defendants. Benjamin George Williams appeared on behalf of plaintiffs.

After consideration of the papers submitted and argument of counsel, and good cause shown therefor, the Court:

(1) GRANTS defendants' Motion for Summary Judgment on the RICO claim, 18 U.S.C. 1961 *et seq.*, on the ground that there was no pattern of racketeering in the closure of the Franciscan factory;

(2) GRANTS defendants' Motion for Sanctions under Rule 11 of the Federal Rules of Civil Procedure in the sum of $350.00; and

(3) Denies plaintiffs' Motion for Leave to Amend the First Amended Complaint without prejudice to permit plaintiffs' to allege any assertable claims not based upon RICO.

DATED: March 15, 1986

/s/ Francis C. Whelan
United States District Judge

SUBMITTED BY:

DATED: March 4, 1986

ROGERS & WELLS
GERALD E. BOLTZ
JOHN W. COTTON
CHRISTINE A. PAGE
C. ROBERT FERGUSON

By: /s/ John W. Cotton
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Wedgwood plc

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA ARCHITECTURAL BUILDING PRODUCTS, INC.,
Plaintiffs,

vs.

FRANCISCAN CERAMICS, INC., etc., et al.,

NO. CV 84 7125 FW

JUDGMENT

This action came on for hearing before the Court, Honorable Francis C. Whelan, presiding, and the issues having been duly heard, the Court on March 5, 1986 issued an Order (1) granting defendant's Motion for Summary Judgment on the First Amended Complaint, (2) granting defendant's Motion for Sanctions under Rule 11 of the Federal Rules of Civil Procedure in the sum of $350.00, and (3) denying plaintiffs' Motion for Lease to Amend the First Amended Complaint without prejudice to permit plaintiffs to allege any assertable claims not based upon RICO. On April 2, 1986 plaintiffs filed a Notice Of Election Not To Amend First Amended Complaint.

Therefore, IT IS ORDERED AND ADJUDGED that plaintiffs take nothing, that the action be dismissed on the merits, and that defendants recover of plaintiffs their costs of action and of plaintiffs and their counsel $350.00 in sanctions.

Dated at Los Angeles, California, this day of April, 1986.

Clerk of the District Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA ARCHITECTURAL
BUILDING PRODUCTS, INC., et al,
Plaintiff/Appellants/Cross-Appellees,

VS.

FRANCISCAN CERAMICS, INC., et al,
Defendants/Appellees/Cross-Appellants.

Nos. 86-5822, 86-5834, 86-5974

D.C. No. CV-84-7125-FW

ORDER AND AMENDED OPINION

Argued February 3, 1987-Pasadena, CA
Submitted March 19, 1987

Filed June 4, 1987
Amended July 31, 1987

Before: Joseph T. Sneed, Jerome Farris
and John T. Noonan, Jr., Circuit Judges

Opinion by Judge Sneed

Appeal from United States District Court for the
Central District of California
Francis C. Whelan, District Judge, Presiding

SUMMARY

RICO

Appeal from grant of summary judgment and imposition of sanctions. Affirmed in part and reversed in part.

This action arises from appellants', dealers in ceramic tile, claim that appellee, a manufacturer of ceramic tile, fraudulently assured them that it would continue in business and supply them with tile at least until the end of March 1984 in violation of the Racketeer Influenced and Corrupt Organization Act (RICO). The district court granted the motion for summary judgment, denied the dealers motion to amend the first amended complaint without prejudice as to future claims not based on RICO, and granted sanctions against the dealers attorneys.

(1) RICO defines pattern of racketeering activity without mentioning continuity. Because the dealers allege that the manufacturer made multiple fraudulent sales to them as multiple vicitms, they have alleged acts which constitute a pattern. (2) The manufacturer led the dealers to believe that it intended to stay in business, not to defraud them, but because that was its true intent. (3) The dealers' depositions reveal that they have no factual basis for alleging that the manufacturer had preconceived plan to close. (4) Furthermore, this court is convinced that no reasonable trier of fact could infer a scheme to defraud from the manufacturer's routine business correspondence. (5) The dealers suggest that the manufacturer ought to have told them it was investigating a contingent plan to close down. (6) However, absent an independent duty, failure to disclose cannot be the basis of a fraudulent scheme. (7) Since the dealers cannot show that there is a genuine issue of fact regarding the manufacturer's alleged scheme to defraud, denial of leave to

amend was well within the district court's discretion. (8) Although Williams ultimately failed to adduce substantial support for the complaint, the suit was not so baseless that sanctions ought to be imposed.

COUNSEL

Benjamin George Williams, Los Angeles, California, for the plaintiffs/appellants/cross-appellees.

John W. Cotton, Los Angeles, California, for the defendants/appellees/cross-appellees.

ORDER

The slip opinion, in these cases, filed June 4, 1987, is hereby amended as follows:

The following sentence is inserted at page 7 of the slip opinion immediately following the sentence, "By contrast, here the dealers allege that Franciscan made multiple fraudulent sales to them as multiple victims.":

> Furthermore, Franciscan's alleged misrepresentations constituted continuing activity from May 1983 to September 1983 — a period of five months.

With the opinion so amended, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

OPINION

SNEED, Circuit Judge:

Dealers in ceramic tile brought this civil action against a manufacturer under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. The district court granted summary judgment for the manufacturer on the ground that there was no pattern of racketeering. The court also denied the dealers' motion for leave to amend their First Amended Complaint with prejudice as to any claims based on RICO. Finally, the court granted $350 in sanctions against the dealers' attorney under Fed. R. Civ. P. 11. We affirm the summary judgment and the denial of leave to amend, but reverse the award of Rule 11 sanctions.

I.

FACTS AND PROCEEDINGS BELOW

Dealers, plaintiffs below and appellants and cross-appellees, are five businesses and six individuals that sold ceramic tile. The appellees and cross-appellants here and defendants below, are a manufacturer of ceramic tile, Franciscan Ceramics, Inc. (Franciscan); its American parent, Josiah Wedgwood & Sons, Inc.; and that company's English parent, Wedgwood plc (Wedgwood).

The dealers' First Amended Complaint alleges that Franciscan fraudulently assured them that it would continue in business and would supply them with tile until at least the end of March 1984. It further alleges that Franciscan decided prior to May 3, 1983 that it would close in September or October 1983. In fact, Wedgwood's board of directors voted on September 22, 1983 to close Franciscan by the end of October. The dealers charge that Franciscan concealed its plan from them so that they

would continue to buy title. This enabled Franciscan to reduce inventory losses that it otherwise would have suffered had it given notice of its intentions prior to May 3, 1983.

Franciscan made the alleged misrepresentations through the United States mail or through interstate telephone calls. Therefore, the misrepresentations might be the basis of a RICO claim. 18 U.S.C. § 1961(1)(B). The dealers claim as damages the costs they incurred in stocking and promoting Franciscan title on the assumption that Franciscan would continue in business, as well as the profits they lost on both the purchased and delivered and the tile ordered but not delivered by Franciscan. Under RICO, damages are trebled. 18 U.S.C. § 1964(c).

Shortly before the discovery cutoff date, the dealers moved for permission to file a Second Amended Complaint. The proposed complaint reflected a more narrow focus than did the first. It alleged as an alternative ground for recovery that Franciscan represented that it had a plan to continue in business through March 1984, when it in fact had no such plan. Franciscan subsequently moved for summary judgment on the First Amended Complaint. Franciscan also moved for sanctions under Fed. R. Civ. P. 11. Franciscan alleged that the dealer's attorney had signed the First Amended Complaint and had persisted in prosecuting the lawsuit when a reasonable inquiry would have disclosed that the First Amended Complaint was not well grounded in fact.

At a hearing held March 4, 1986, the district court granted the motion for summary judgment, denied the motion to amend the First Amended Complaint without prejudice as to future claims not based on RICO, and granted $350 in sanctions under Fed. R. Civ. P. 11. On April 7, 1986, Franciscan filed a notice of cross-appeal

from the award of sanctions, insisting that the sanctions were inadequate. On April 30, 1986, the district court entered a judgment conforming to its earlier order. On May 22, 1986, the dealers filed a notice of appeal from this judgment. All notices were timely under Fed. R. App. P. 4(a). This court has jurisdiction under 28 U.S.C. § 1291. The two appeals and the cross-appeal are consolidated in this action.

II.

PATTERN OF RACKETEERING

A. Standard of Review for Summary Judgment.

As we regularly recite, this court reviews de novo a grant of summary judgment. *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 764 (9th Cir. 1986). Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In three recent cases, the Supreme Court by clarifying what the non-moving party must do to withstand a motion for summary judgment, has increased the utility of summary judgment. First, the Court has made clear that if the non-moving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, the summary judgment is appropriate. See *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of

fact *because they may reasonably be resolved in favor of either party.*" *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986) (emphasis added). Finally, if the factual content makes the non-moving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986). No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment.

B. Summary Judgment was Appropriate.

The district court based its grant of summary judgment on the ground that the dealers had not shown a "pattern" of racketeering activity under RICO. Although we cannot agree with this conclusion, we do hold that the dealers failed to show that there is a genuine issue of fact regarding the facts of fraud on which the RICO charge is based. Therefore summary judgment was appropriate and we affirm the district court.

1. RICO's "Pattern" Requirement.

Turning to the "pattern" requirement, our starting point is to recognize that a "pattern of racketeering activity" consists of at least two acts of racketeering activity. 18 U.S.C. § 1961(5). The theory of the dealers, set forth in their First Amended Complaint, is that Franciscan committed at least twenty-four separate acts of mail and wire fraud, which are acts of racketeering activity under 18 U.S.C. § 1961(1)(B), and thus constitute a "pattern".

Franciscan replies by expanding the focus of inquiry. In its view the alleged acts of mail and wire fraud do not constitute a "pattern" of racketeering activity because

they pertain to a *single* alleged criminal episode, the closing of Franciscan. A "pattern," Franciscan points out, requires " '*continuity plus relationship*'." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14, 105 S. Ct. 3275, 3285 n. 14 (1985) (quoting S. Rep. No. 617, 91st Cong. 1st Sess. 158 (1969) (emphasis added)). Continuity is lacking, Franciscan insists, when acts pertain to a single criminal episode. Under these circumstances there is no ongoing illegal activity.

[1] This approach is not without its appeal. However, the plain words of RICO preclude it. RICO defines "pattern of racketeering activity" without mentioning continuity. See 18 U.S.C. § 1961(5). There is no suggestion that the underlying illegal acts must be part of different criminal episodes. The dictim in *Sedima is* suggestive, but without additional explication by the Supreme Court we decline to follow its lead. Nor does our recent decision in *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986), require us to do so. There we held that plaintiffs failed to state a RICO claim by alleging acts of mail and fraud relating to the diversion of a single shipment of products. *Id.* at 1399. That was a single fraud perpetrated on a single victim. By contrast, here the dealers allege that Franciscan made multiple fraudulent sales to them as multiple victims. Furthermore, Franciscan's alleged misrepresentations constituted continuing activity from May 1983 to September 1983 — a period of five months. Therefore the dealers have alleged two or more acts of racketeering activity, and this, we hold, constitutes a "pattern." (Footnote 1)

2. The alleged intent to defraud.

The elements of the alleged mail and wire fraud consist of, first, a scheme or artifice devised with specific intent to defraud and, second, use of the United States mails or

interstate telephone wires in furtherance thereof. *Schreiber,* 806 F.2d at 1399-400; *see United States v. Bohonus,* 628 F.2d 1167, 1171 & n.7 (9th Cir.), *cert. denied,* 447 U.S. 928 (1980). In the context of Franciscan's motion for summary judgment, the issue is whether there exists a genuine issue of fact with respect to whether Franciscan had an intent to defraud. The dealers allege that Franciscan has actually admitted this intent. We disagree.

[2] The record, on the basis of which Franciscan's motion must be judged, reveals that Franciscan never misrepresented its intentions to the dealers. Until the day it closed, Franciscan operated as a going concern. Although Franciscan's management investigated closing as a contingency plan, it did not conduct the business as though closing were likely. Franciscan led the dealers to believe that it intended to stay in business, not to defraud them, but because that was its true intent. Therefore there was no fraud. (Footnote 2) Franciscan's massive, unforeseen operating losses, which upset its plans and forced it to close, cannot retroactively make fraudulent an intent that was honest during the relevant period.

As Wedgwood and its subsidiaries closed their books in March 1983, management realized that Franciscan would show losses substantially exceeding projections. To correct the problem, Wedgwood appointed James Moffat to be the new chief executive officer of Franciscan. Moffat was "to try to establish whether there was a future for the operation, and if there was not, then to tidy up the position before closing down and disposing of the site as real estate, although it was felt that this ultimate step would be second best." Extracts of Minutes of a Meeting of Directors April 27, 1983, Except of Record (E.R.) at 294. All of the material collected by the dealers is consistent with the fact that, between May and September 1983,

Moffat tried to restore Franciscan's profitability while investigating opportunities for disposing of the real estate, should it prove necessary to close down. Although Moffat personally was convinced by August 19 that Wedgwood ought to close Franciscan, the board did not make its decision until after Wedgwood's senior operating executive made his annual visit to Franciscan in September 1983. Franciscan continued production through October to fill outstanding orders.

From May to September 1983, Franciscan invested substantially in its title business. Franciscan continued in full production and increased its own inventory. It developed new designs and colors of tile, even some that would not be available until October 1983 or later. It hired a technical consulting firm to visit its factory and recommend improvements. And it explored possibilities for future joint marketing arrangements with other tile manufacturers.

Had Franciscan planned to close, it is unlikely that it would have undertaken these expensive projects. It is also unlikely that Franciscan would go to such lengths merely to encourage the dealers to buy more tile. No economic incentive to act in that manner exists. Therefore to avoid the stigma of implausibility, the evidentiary burden of the dealers is heavy. "[I]f the claim is one that simply makes no economic sense — [the parties opposing summary judgment] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." Matsushita, 106 S. Ct. at 1356. We conclude that the dealers have failed to carry this burden.

[3] Our conclusion is not shaken by those portions of the record on which the dealers particularly rely. First, there is no direct evidence — no "smoking gun." The

dealers' depositions reveal that they have no factual basis, apart from discussions with their counsel, for alleging that Franciscan had a preconceived plan to close, far less a plan to dump inventory. E.R. at 506-07 (Larry Ed Bedrosian), 537 (Henry C. Croom), 577-78 (Charles T. Nelson), 584-85 (Vincent Pompo), 590-91 (Richard Thomas Sokol), 601-02 (H.M.M. "Dick" van Gilse). Second, the indirect evidence is weak. The dealers claim that Franciscan made representations that were inconsistent with its decision to close in September 1983. These representations had as their source either routine business correspondence, individual assurances, of failures to disclose. We now examine each of these sources.

a. Routine business correspondence

The dealers purport to find a promise by Franciscan to stay in business in a letter describing its volume discount pricing plan, E.R. at 12-13. (First Amended Complaint ¶ 22), in a letter announcing a reduced price for a line of tile, E.R. at 13 (First Amended Complaint ¶ 24), and in its agreements with dealers to supply in the future certain quantities of tile at specified prices, E.R. at 13-20 (First Amended Complaint ¶¶ 25-34). The dealers confuse these contingent statements of intent with binding commitments. For example, Franciscan said its volume discount pricing plan would expire March 31, 1984, the date the term of its fiscal year and business plan ends. This is merely a representation that volume discounts probably would not change before then. It is not a promise that Franciscan would remain in business at all costs until then. Nor did Franciscan's promise that, after August 1, it would fill orders for a certain line of tile more quickly and at a lower price constitute a promise to stay in business indefinitely. A promise to sell at a specific price in the future is not a promise to remain in business long

enough to sell at that price. To assure that, a prudent businessman would enter into a contract providing for future delivery of specific goods at the agreed price.

[4] Franciscan's routine business correspondence reveals that it made a sincere and energetic effort to improve sales and become profitable. It never explicitly promised to stay in business until a certain date. We are convinced that no reasonable trier of fact could infer a scheme to defraud from this evidence.

b. Individual assurances

The dealers, in support of their motion opposing summary judgment, point to their declarations describing how officers of Franciscan reassured them when they doubted Franciscan's viability. E.R. at 1027-106. They describe how, early in 1983, officers of Franciscan said that Franciscan was "here to stay" or made similar general assurances. These representations of their intentions were not false. Franciscan had not yet seriously considered closing, and it in fact remained in business six to nine months longer.

The dealers also declare that, in July and August 1983, the executive Vice President of Franciscan, Ira Shore, told them that he had six, twelve, or eighteen months "to turn the business around." E.R. at 1029 (Richard Sokol), 1043 (Vincent Pompo), 1057 (J. Timothy Nelligan), 1078 (Bob Steffler), 1099 (Larry Bedrosian). Shore's deposition confirms that, in early August, he visited several dealers to promote sales and mentioned the six-month time frame. Shore based his statement on a July conversation with Moffat. He told Moffat that he needed six months to improve significantly sales to distributors. Moffat wanted faster results, but accepted Shore's timetable. E.R. at 961-76.

No promise by Moffat was made to keep Franciscan open six months while Shore tried to improve sales. Nor did Shore understand Moffat to have made such a promise. By mentioning the six-month period to the dealers, Shore sought to emphasize the urgency of Franciscan's appeal to them to buy more. They did not respond. When Shore first made his six-month projection, sales had fallen 36% short of the business plan for June. E.R. at 342. Sales fell 43% short of plan in July, and 37% short of plan in August. E.R. at 346, 463. Franciscan could see the handwriting on the wall. It did not have to wait another four months to recognize the inevitable. Sales were not to improve.

No reasonable trier of fact could infer fraud from Shore's statements. In context, Shore merely fixed a target date before which, to avoid serious trouble, sales would have to improve. Only an incorrigible optimist could understand that as either a promise to remain open without regard to sales or as a representation of sound economic health.

c. Nondisclosure

[5] The dealers suggest that Franciscan ought to have told them that it was investigating a contingent plan to close down. E.g., E.R. at 1883-86. We disagree.

[6] Absent an independent duty, such as a fiduciary duty or an explicit statutory duty, failure to disclose cannot be the basis of a fraudulent scheme. *United States v. Dowling,* 739 F.2d 1445, 1449 (9th Cir. 1984), *rev'd on other grounds,* 473 U.S. 207 (1985). No such duty existed and, hence, no fraud.

III.

DEALERS' MOTION FOR LEAVE TO AMEND

A. Standard of Review

This court reviews for an abuse of discretion the district court's denial of leave to amend after a responsive pleading has been filed. *Gabrielson,* 785 F.2d at 765. Unless this court has a definite and firm conviction that the district court committed a clear error of judgment, it will not disturb the district court's decision. *Chism v. National Heritage Life Ins. Co.,* 637 F.2d 1328, 1331 (9th Cir. 1981). When exercising its discretion, however, the district court must heed Fed. R. Civ. P. 15(a), which says that leave to amend "shall be freely given when justice so requires." *Foman v. Davis,* 371 U.S. 178, 182 (1962). Valid reasons for denying leave to amend include undue delay, bad faith, prejudice, and futility. *Id.*

B. Analysis

[7] It is on "futility" that we rest our decision. The proposed Second Amended Complaint adds, as an alternative theory of recovery, allegations that Franciscan actively considered closing while it represented to the dealers that it intended to remain open. Like the First Amended Complaint, the proposed complaint requires the dealers to prove that Franciscan represented that it would remain open. We can add nothing to our explanation why no reasonable trier of fact could conclude that Franciscan's statements had this force. It follows that the dealers cannot show that there is a genuine issue of fact regarding Franciscan's alleged scheme to defraud. Denial of leave to amend was well within the district court's discretion. *Gabrielson,* 785 F.2d at 766; see *Klamath-Lake Pharmaceutical Ass'n. v. Klamath Medical Sev. Bureau,*

701 F.2d 1276, 1293 (9th Cir.), *cert. denied,* 464 U.S. 822 (1983).

IV.

SANCTIONS UNDER FED. R. CIV. P. 11

A. Standard of Review

This court reviews de novo the district court's legal conclusion that the conduct of the dealers' attorney, Benjamin Williams, violated Fed. R. Civ. P. 11. *Lacina v. C K Trucking,* 802 F.2d 1190, 1193 (9th Cir. 1986).

B. Analysis

[8] We reverse award of sanctions against Williams. Franciscan charges that Williams signed the First Amended Complaint and persisted in prosecuting the lawsuit when a reasonable inquiry would have disclosed that the First Amended Complaint was not well grounded in fact. Although Williams ultimately failed to adduce substantial support for the complaint, the suit was not so baseless that sanctions ought to be imposed. Franciscan's sudden closing was circumstancial evidence, however weak, of a possible earlier undisclosed plan to close. The dealers say they would have bought less in inventory from Franciscan if they had known of its impending closure, so dissimulation might have been in Franciscan's interest. While these facts do not suffice to create a genuine issue for trial, we cannot say that the complaint is so lacking in plausibility as to make Williams' decision to sign and certify it subject to sanctions under Fed. R. Civ. P. 11.

AFFIRMED in part; REVERSED in part.

Footnotes

1. We are aware that two circuits have held that illegal acts pertaining to a single criminal episode do not constitute a "pattern of racketeering activity." *International Data Bank, Ltd. v. Zepkin,* 812 Fed. 2d 149, 154 (4th Cir. 1987); *Superior Oil Co. v. Fulmer,* 785 F.2d 252, 257 & n.7 (8th Cir. 1986), *cited with approval in Madden v. Gluck,* 815 F.2d 1163 (8th cir. 1987). Three other circuits have held that some acts of racketeering activity do not disply the "continuity" that a pattern requires, although they have rejected a bright-line "single episode" exception. *Torwest DBC, Inc. v. Dick,* 810 F. 2d 925, 928-29 (10th Cir. 1987), *cited with approval in Condict v. Condict,* 815 F. 2d 579, 583-85 (10th Cir. 1987); *Roeder v. Alpha Indus. Inc.,* 814 F.2d 22, 30-31 (1st Cir. 1987); *Morgan v. Bank of Waukegan,* 804 F. 2d 970, 975-76 (7th Cir. 1986), *construed in Marks v. Pannell Kerr Forster,* 811 F.2d 1108, 1110-12 (7th Cir. 1987). Two circuits have interpreted "pattern of racketeering activity" broadly and literally; as we do. *United States v. Ianniello;* 808 F. 2d 184, 192 (2d Cir. 1986), *petition for cert. filed,* 55 U.S.L.W. 3678 (U.S. Mar. 27, 1987) (No. 86-1553); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.,* 782 F. 2d 966, 971 (11th Cir. 1986).

2. This explanation also accounts for Moffat's statement that there was no "potential closure" of the factory on June 30, 1983. While closure was then possible, as it is to some degree for any business, Moffat was not then persuaded that closure was inevitable or desirable. Certainly, Moffat operated Franciscan as though there was no "potential closure." Therefore Moffat's statement does not undermine his credibility or contradict other documents. We reject the dealers' suggestion that Moffat's credibility can be the basis for denying summary judgment. See Excerpt of Record (E.R.) at 843-46.

APPENDIX C

18 U.S.C. §§ 1961-1968 (Racketeer Influenced and Corrupt Organizations Act — RICO)

§ 1961. Definitions

As used in this chapter —

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code; Section 201 (relating to bribery), Section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds, sections 891-894 (relating to extortionate credit transactions), section 1804 (relating to the transmission of gambling information), section 1341 (relating to wire fraud), sections 14-61-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of mone-

tary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 2341 and 2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations), or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act:

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred

after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "Unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and,

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of

Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of

such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 29, 1987, I served the within Cross-Petition for Writ of Certiorari in re: "California Architectural Building Products, Inc. v. Francisca Ceramics, Inc." in the United States Supreme Court, October Term 1987, No. 87-621;

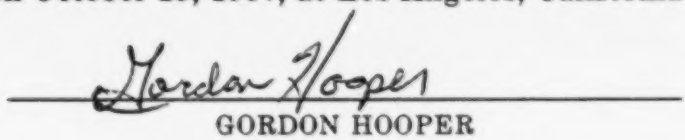
on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Benjamin George Williams, Esq.
1550 Euclid Street
Santa Monica, CA 90404

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 29, 1987, at Los Angeles, California



GORDON HOOPER

87-721

No. 87-621

Supreme Court, U.S.
FILED
NOV 27 1987

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

CALIFORNIA ARCHITECTURAL BUILDING PRODUCTS, INC., a California corp., et al.,

Petitioners,

vs.

[Consolidated]
86-5822
86-5834
86-5974

FRANCISCAN CERAMICS, INC., et al.,

Respondents.

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BUILDING PRODUCTS, INC., et al.

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NO. 87-621

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CALIFORNIA ARCHITECTURAL	(Consolidated)
BUILDING PRODUCTS, INC., a California corp., et al,	86-5822 86-5834 86-5974
Petitioners,	
vs.	
FRANCISCAN CERAMICS, INC., et al,	
Respondents.	

BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE:

(a) Omissions in cross-petitioner's Statement.

The cross-petitioner's statement of so-called "uncontroverted facts" (Cross-Petition at pp. 5-6) mentions no misrepresentations made to the Tile Dealers except "routine business correspondence." The Cross-Petition would have this Court believe that the Tile Dealers, in a relationship of dependency with Franciscan, did not ask Franciscan for assurances that Franciscan would stay in business, and that the dealers ignored the fact that their major supplier appeared to be failing and might not be able to fulfill its commitments to supply Franciscan tile. The Tile Dealers' statement of this case includes the full story, namely, that the Tile Dealers

requested and received repeated reassurances from Franciscan's top management that the company was not considering closure. These representations were made credible by Wedgwood's financial wherewithall to support Franciscan.

(b) The full facts of the case are set forth in the Tile Dealers' original Petition for Writ of Certiorari. Franciscan would have this Court believe that the decision to close a multi-million dollar business was made in a single day. The Tile Dealers have found evidence through discovery that proves otherwise. The Tile Dealers' Opposition to Franciscan's Motion for Summary Judgment shows that:

1. The Tile Dealers asked for and were given assurances, orally and in

writing, that Franciscan's plans were continued existence; and

2. That Wedgwood closed Franciscan after long forethought and planning.

The Tile Dealers are entitled to a hearing before a jury on the credibility of Franciscan's protestations of innocence.

REASONS WHY THE CROSS-PETITION AND THE ORIGINAL PETITION SHOULD BE GRANTED AND THIS COURT SHOULD HOLD THAT FRANCISCAN'S ALLEGED ACTS CONSTITUTE A PATTERN OF RACKETEERING ACTIVITY UNDER RICO.

The Tile Dealers agree with Franciscan that the question of what constitutes a "pattern of racketeering activity" after

Sedima, 105 S.Ct. 3275, needs to be decided by this Court in this case.

Various circuits of the Court of Appeals have adopted various views and tests, with great variations and conflicts between the circuits. These are set forth in Franciscan's Cross-Petition, at pp. 7-12.

The Third Circuit recently joined the Second, Ninth and Eleventh Circuits in holding that one "scheme" suffices for a RICO "pattern of racketeering activity", please see Barticheck v. First Union Bank (3rd Cir. 1987) 836 F.2d 36, 56 U.S.L.W. 2260.

The district courts are attempting to determine the law in this area following this Court's decision in Sedima and the pronouncements of the courts of appeals. The dockets of the district courts are

crowded with civil RICO cases and different results on the pleadings alone may well occur from one district court to another, and from one circuit to another.

This lack of uniformity encourages forum shopping, which this Court should act to prevent by ruling in this case.

Under Supreme Court Rules 17(a) and (c) this Court should hear this case in full, both Petition and Cross-Petition, and should decide the critical questions of law raised in the Petition and Cross-Petition.

I. THE PATTERN OF FRANCISCAN'S ALLEGED FRAUD CLEARLY FITS WITHIN THE RICO "PATTERN" ANALYSIS OF THE FIRST, FOURTH, TENTH AND ELEVENTH CIRCUITS.

While Franciscan agrees with the Ninth

Circuit that Franciscan's alleged pattern of fraud falls within the broad concept of "pattern" used by the Ninth Second, Third and Eleventh Circuits, Franciscan's alleged fraud also falls within the more flexible definitions of "pattern" used by the First, Fourth, Seventh and Tenth Circuits. It is untrue that, as suggested by Franciscan, the First, Fourth, Seventh and Tenth Circuits have "achieved the same result" as the multiple schemes test by adopting a single act "once is not enough" test (see Cross-Petition at p. 10). In Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986), the Seventh Circuit specifically rejected the multiple schemes test, and accepted a RICO complaint dealing with a fraud much more limited than that committed by Franciscan. The Morgan fraud was "a single grand scheme"

of "distinct acts taking place over a period of nearly four years." 804 F.2d at 976. The fraud was committed to induce investments in a single business venture.

As recognized by the Ninth Circuit, the Tile Dealers allege that Franciscan committed "at least twenty-four separate acts of mail and wire fraud." See opinion, 818 F.2d at 1469. The fraud affected all 142 Franciscan tile dealers nationwide, and specifically affected the five businesses and six individual plaintiffs who have joined in this lawsuit. As illustrated in the Tile Dealers' Declarations submitted with the court record in this suit, these frauds affected many distinct building projects on which the Tile Dealers had bid but which they could not follow through on due to lack of anticipated Franciscan tile.

The fraud also induced the Tile Dealers to make numerous purchases of tile for their inventory, all of which was rendered worthless upon Franciscan's closure. This pattern is far broader than the single fraudulent scheme in Morgan.

Similarly, the Franciscan fraud is more extensive than the alleged frauds rejected as not constituting RICO patterns in Condict v. Condict, 815 F.2d 579 (10th Cir. 1987), International Data Bank, Ltd. v. Zepkin, 812 F.2d 149 (4th Cir. 1987), and Roeder v. Alpha Indus., Inc., 814 F.2d 22 (1st Cir. 1987). Condict involved a family quarrel and fraudulent concealment of the assets of a family ranch. See 815 F.2d at 580. Roeder involved a single bribe paid in installments and executed through phone calls and letters. See 814 F.2d at 31. The International Data Bank

fraud was a false statement enclosed in a stock prospectus. Franciscan's fraud was a series of multiple misrepresentations which induced numerous tile sales, having many victims and affecting a large number of building projects. This pattern bears little resemblence to the schemes found too small or simple to be covered by RICO in the above-described cases. The Franciscan fraud would have been accepted by the First, Fourth, Tenth and Eleventh Circuits under their case-by-case approach to analysis of the RICO pattern requirement.

II. FRANCISCAN'S ALLEGED PATTERN OF FRAUDULENT ACTS CONSTITUTES A RICO PATTERN EVEN UNDER THE MORE STRINGENT REQUIREMENT OF MULTIPLE SCHEMES.

As acknowledged in Franciscan's Cross-Appellant's Brief, the most stringent test yet used for alleging a RICO pattern of racketeering activity is that originated by Judge Milton I. Shadur of the Northern District of Illinois (see Cross-Petition at p. 8). Judge Shadur rejected the idea that a single "episode" could constitute a RICO pattern, requiring instead that multiple criminal schemes be present for there to a violation of RICO.

But even Judge Shadur has recognized that fraud perpetrated on multiple victims constitutes a RICO pattern. As Judge Shadur stated in Papagiannis v. Pontikis, 108 F.R.D. 177, 179 (N.D.Ill. 1985), "...a malefactor's perpetration of fraudulent activities on **more than one victim**, while following the same modus operandi, is indeed a pattern for RICO purposes.

United States v. Yonan..."[1] Judge Getzendanner, also of the Northern District of Illinois, held that fraud causing **multiple injuries** is enough to make up a RICO pattern. In Heritage Ins. Co. of America v. First National Bank of Cicero, 629 F.Supp. 1412, 1416-17, a scheme to issue fraudulent escrow statements to induce an insurer to issue performance and payment bonds was held by Judge Getzendanner to be a RICO pattern, where "each alleged mailing instigated a

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(Emphasis added.)

[1] In United States v. Yonan, 622 F.Supp. 721 (N.D.Ill. 1985), payment of bribes by a lawyer to one person to fix ten separate criminal cases was held by Judge Shadur to establish a pattern.

new diversion of funds, and hence a new or separate injury. Because the separate diversions can be characterized as new criminal acts, not simply constituent mailings performed in the execution of a single transaction, the pattern requirement of RICO is satisfied..."

The Franciscan fraud satisfies both the multiple victims and multiple injuries tests. Franciscan victimized its 142 tile dealers, including the five businesses and six individuals who are plaintiffs in this suit. Multiple fraudulently-induced mailings of tile orders each constituted a separate injury. Valley Tile alone placed over 1,100 orders of tile as a result of the Franciscan pattern of fraud. Even under the most stringent of RICO pattern tests, the Franciscan fraud amounts to a clear violation of RICO.

III. THIS CASE PROVIDES A SUITABLE FACT PATTERN FOR CLARIFICATION OF THE RICO PATTERN REQUIREMENT.

The Ninth Circuit has summarized the conflict between the Federal Circuits in determining what constitutes a "pattern of racketeering activity" under RICO, 18 U.S.C. §1961(5). The alleged pattern of FRANCISCAN'S fraud involves multiple victims and multiple injuries. It consisted of ongoing activity over a considerable period of time, and provides the kind of continuity plus relationship which would present the "threat of continuing activity" which the RICO statute was designed to stop.

See the Senate Report on RICO, S.Rep. No. 91-617, 91st Cong. 1st Sess. 158 (1959) as quoted in Sedima, S.P.R.L. v.

Imrex Co., 105 S.Ct. 3275, 3285, Note 19.

The Ninth Circuit has correctly ruled in this case that "the plain words of RICO preclude" Franciscan's proposed approach to the statute's pattern of racketeering activity requirement. Please see 818 F.2d at 1469. The Tile Dealers respectfully submit that this Court should make clear that the Franciscan case involves the kind of allegations of white-collar fraud, by use of the United States mails and interstate telephone wires which RICO was designed to prevent.

CONCLUSION

For the reasons stated above, both Franciscan's Cross-Petition for a Writ of Certiorari and the Tile Dealers' Petition

for Writ of Certiorari should be granted.

DATED: November 25, 1987

Respectfully submitted,

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